United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

77-1078

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

B

Docket No. 77-1078

UNITED STATES OF AMERICA — Appellee,

v.

PAULINE A. STEBBINS — Appellant

On Appeal From the U. S. District Court for the District of Vermont

(Criminal, No. 76-63-1)

BRIEF FOR APPELLANT

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4 May 1977

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UNITED STATES OF AMERICA — Appellee

v.

PAULINE A. STEBBINS — Appellant

BRIEF FOR APPELLANT

I - STATEMENT OF THE CASE

The Appellant, Pauline A. Stebbins, was charged, by superseding indictment dated 9 November 1976, with violation of 18 USC §1623, False Declarations Before Grand Jury. (App. p. 1) It was alleged that the Appellant made false declarations before a Federal Grand Jury in Burlington, Vermont, on 4 October 1975. [The allegation in the indictment that the statements were made on 4 September 1975 was in error and was amended at trial.]

More specifically, the Appellant was accused of

making false declarations pertaining to the payment or delivery of a legal fee of $10,000.00 in cash, to Frank F. Fucci, Esquire, on behalf of her son, William Paul Stebbins, on 22 May 1973. During the course of her Grand Jury testimony, the Appellant maintained that she did not pay, transfer or transmit the $10,000.00 in question to Frank F. Fucci. The Appellant maintained this postion during the course of her trial in the District Court for the District of Vermont. The Government claimed that the Appellant had paid or delivered the $10,000.00 in question to Frank F. Fucci.

The Appellant was originally indicted on 8 September 1976, and entered a not guilty plea upon arraignment on 17 September 1976. A Motion for Discovery under Rule 16 was heard on 29 September 1976 and granted (App. p. 12 and 15). Various other motions, not pertinent to this appeal, were filed by counsel for the Appellant. The Appellant was arraigned on the superseding indictment on 19 November 1976, continuing her not guilty plea.

Counsel for the Appellant filed a Motion to Produce Rough Notes Under Federal Rules of Criminal Procedure, Rule 16, and under 18 USC §3500. (App. p. 20 and p. 26) The Government opposed this Motion. A hearing was held on 29 and 30 November 1976, during which the four government agents involved were all examined in open court, in the absence of the jury.

The District Court denied the Appellant's Motion.

After a five-day jury trial, the Appellant was found guilty of making false declarations to the Grand Jury concerning the payment or delivery of a legal fee on behalf of her son, William Paul Stebbins. This appeal followed.

II - STATEMENT OF FACTS

The Appellant was convicted because the jury believed she handed or otherwise transferred to Frank F. Fucci the sum of $10,000 in cash on behalf of her son, William Paul Stebbins, on 22 May 1973 at the Polka Dot Restaurant at White River Junction, Vermont.

The key government witnesses were Frank F. Fucci, two Federal Bureau of Investigation agents and two Internal Revenue Service agents. The government agents testified at trial as to matters which were discussed during the course of their interviews with Appellant.

Prior to the commencement of the trial, the Appellant filed a Motion To Produce Rough Notes Under Federal Rules of Criminal Procedure, Rule 16 and 18 USC § 3500, the Jencks Act. (App. p. 20) The Government objected, with a Memorandum With Respect to 18 USC §3500 and the Destruction of Agent's Notes. (App. p. 26)

The Appellant's Motion was argued before the District Court on 26 November 1976 with voir dire examinations

of the four agents being held on 29-30 November 1976. Counsel for Appellant argued that if the agents were not able to produce their rough notes they should not be able to testify at the trial of the Appellant. While the Appellant's Motion to Produce Rough Notes did not specifically include the question of the rough notes taken by I.R.S. agents, Edward R. Burke and Ronald R. DeCoigne, the written motion was orally amended on 26 November 1976 to include both agents. At this 26 November 1976 hearing the Court was requested to exclude the testimony not only of F.B.I. agents Albert O. Axton and John E. Hess, but also the testimony of I.R.S. agents Burke and DeCoigne unless all of those agents were able to produce for inspection their rough interview notes. (Transcript of Hearing before the United States District Court for the District of Vermont on 26 November 1976 at pp 3-5.)

After the voir dire of the four agents, in an argument set forth on pages 128 through 134 of the Transcript, Counsel for Appellant argued that the four agents in question should be precluded from testifying unless they were able to produce their rough or field notes of their interviews with the Appellant. The basic theory of Appellant was that such rough or field notes were required to be presented to the Court for the Court's physical inspection so that the Court

could make a determination as to whether such evidence was discoverable evidence, insofar as the Appellant was concerned. Counsel referred the Court to three, separate sources in support of the foregoing argument, namely: (1) The Jencks Act 18 USC §3500; (2) Rule 16 of the Federal Rules of Criminal Procedure; and (3) Brady v. Maryland, 373 U.S. 83, 83 SCt 1194, 10 LEd 2d 215 (1963). The Trial Court denied the Motion and refused to impose the sanctions requested by Counsel for Appellant. (Tr. pp 133-134)

The Appellant presents a review for the Court of Appeals of the Trial Court testimony of Frank Fucci, F.B.I. Agents Axton and Hess, and I.R.S. agents Burke and DeCoigne, as a background against which this Court may judge the crucial nature of the testimony of the government agents and the prejudice suffered by the Appellant.

The testimony of Frank F. Fucci demonstrates that he was the government's key witness, but also was not an extremely strong witness due to the extent of the confusion and contradictions which characterized his testimony.

The testimony of the four agents shall be reviewed, first, with respect to the manner in which the interviews were conducted, and the creation and destruction of rough interview notes; and, secondly, with respect to the

bearing the testimony of these four agents had on the conviction of the Appellant, in corroborating Fucci's testimony.

It is the contention of the Appellant that the impact of the testimony of the four government agents was significant in light of the confusion and contradictory evidence given by Frank F. Fucci, the key Government witness.

A - The Testimony of Frank F. Fucci.

Prior to the commencement of the trial in the District Court, the Government admitted that without the testimony of Frank F. Fucci, it would be virtually impossible to convict the Appellant. (See Appendix, Government's Opposition to Motion to Take Deposition, p. 17 at p. 19) Accordingly, by the Government's own, pretrial admission, Frank F. Fucci was its crucial witness.

The conviction of the Appellant hinged upon the belief of the jury that the Appellant handed or otherwise transferred to Frank F. Fucci a paper bag containing $10,000.00 in cash. During the course of her Grand Jury testimony, the Appellant denied, on several occasions, that she ever handed or otherwise transferred $10,000.00 to Frank F. Fucci in connection with legal representation of her son, William Paul Stebbins, in a 1973 criminal case in Vermont District Court, Unit No. 6, Windsor Circuit. The Appellant maintained this

position during the course of her trial.

Fucci testified at the Appellant's trial that he received the $10,000.00 fee sometime before 9:30 A.M. on 22 May 1973 at the Polka Dot Restaurant (Tr. pp 139 and 141); that on the morning in question he was seated in a booth at the Polka Dot Restaurant with both Pauline A. Stebbins and her son, William Paul Stebbins (Tr. pp 139, 146-147 and 149); that he asked William Paul Stebbins if he had raised his legal fees (Tr. pp 139, 147, 149-150, 155 and 164); that Pauline A. Stebbins left the booth and went to the area of the cash register and obtained a paper bag containing the $10,000.00 which she brought back to the booth and handed to Fucci (Tr. pp 139, 141-142, 147, 155 and 164); and that he immediately took the $10,000 to his office (Tr. pp 140-141, and 147).

At approximately 1:30 P.M. on the same day, 22 May 1973, Frank F. Fucci took one-half of the cash he had earlier received to the office of his co-counsel, Frank G. Mahady (Tr. pp 142-143).

At the Vermont District Court session of 22 May 1973 William Paul Stebbins entered a plea of no contest to a charge of simple assault; the charge had been reduced from aggravated assault as the result of a plea bargain worked

out between Frank F. Fucci and the office of the Windsor County State's Attorney (Tr. pp 143-144). Attorney Fucci's recollection was that the criminal information was amended during the District Court Session by Deputy State's Attorney, Michael Sheehan (Tr. pp 144-145).

Testimony by Agent Axton, not subject to Appellant's Motion for exclusion, established that on the Friday immediately preceding his 30 November 1976 Trial Court testimony, Fucci told the Assistant U.S. Attorney and F.B.I. Agent Axton that on the morning of 22 May 1973 he (Frank F. Fucci) requested his fee from Pauline A. Stebbins (as opposed to William Paul Stebbins) and that William Paul Stebbins was not even present at the Polka Dot Restaurant on the morning of 22 May 1973 (Tr. pp 150-155, and 165-166). Agent Axton testified, among other things, that on Friday, 26 November 1976, he and the Assistant U.S. Attorney both visited prosecution witness Fucci, at his law offices in White River Junction, Vermont. Agent Axton testified that during the course of that interview Attorney Fucci stated that when he received the fee on 22 May 1973 that only Pauline A. Stebbins was present and, furthermore, that he did not see William Paul Stebbins (Tr. pp 291-293 and 309).

In addition, I.R.S. Agent Burke testified that when he interviewed Frank F. Fucci on 14 May 1974 (Tr pp 331)

at Frank F. Fucci's offices in White River Junction, Vermont Fucci stated, among other things, that when Fucci received the $10,000.00 fee at the Polka Dot Restaurant on 22 May 1973 from Pauline A. Stebbins there were no witnesses to the transaction (Tr. pp 332-334 and 340). Finally, I.R.S. Agent James F. Tighe also testified that on 14 May 1974 Frank F. Fucci stated that there were no witnesses to the transaction (Tr. p. 358).

Agent Axton also testified that on the Friday immediately preceding Frank F. Fucci's testimony, Fucci had stated to the Assistant U.S. Attorney and Agent Axton that he (Frank F. Fucci) had requested from the Appellant one or two days before 22 May 1973, that she have his fee available on the morning of 22 May 1973. At the trial, though, just four days later, Fucci did not recall making such a statement on the preceding Friday and, furthermore, he did not recall making any arrangements with respect to his fee prior to 22 May 1973 (Tr. pp 156-160 and 163).

Fucci was unable to recall whether State's Attorney Paul Hudson or Deputy State's Attorney Michael Sheehan amended the criminal information against William Paul Stebbins on 22 May 1973, although he did recall that Michael Sheehan was present in Court on that date; that the information was amended at the bench on that date; and that Paul Hudson was notpresent in Court on that date. Even though the amended informa-

tion bore the initials of Paul F. Hudson, witness Fucci could not explain this discrepancy. (Tr. pp 192-193)

Yet another significant discrepancy which surfaced at the trial concerned the payment by Fucci of $5,000.00 to Frank G. Mahady, his co-counsel. On direct examination Fucci testified that he took $5,000.00 to Mahady after lunch, at approximately 1:30 P.M. on 22 May 1973 (Tr. pp 142-143); however, on cross examination it was brought out that in November of 1974 Fucci told Agents Burke and Tighe that after he (Frank F. Fucci) received the $10,000.00 in the Polka Dot Restaurant, he walked across the street to Mahady's office and paid him $5,000.00. Agent Burke testified on cross examination that in May of 1974 Frank F. Fucci told him that after receiving the $10,000.00 fee "he [Fucci] departed the Polka Dot Restaurant and that he walked across the street to the Coolidge Hotel to the office, to the second floor, to the office of Frank Mahady" in order to give Mahady $5,000.00 in cash from the brown paper bag (Tr. pp 340-341).

Thus, the Government's key witness gave Trial Court testimony which directly contradicted previous statements which he had given to various government agents concerning two very significant events which occurred on 22 May 1973 and concerning one significant event which occurred prior to 22 May 1973, namely:

1. At the trial Fucci testified that when the Appellant handed him the $10,000.00 she did so in the presence of at least one witness, namely, William Paul Stebbins, her son; however, on the Friday immediately preceding the date of his Trial Court testimony Fucci indicated that William Paul Stebbins was not even present at the Polka Dot Restaurant on the morning of 22 May 1973. Also, on 14 May 1974 Fucci told Agent Burke that there were no witnesses to the transfer of the money on 22 May 1973;

2. At the trial Fucci testified that after he received the $10,000.00 fee at the Polka Dot Restaurant he went directly to his own law offices and that he did not give his co-counsel, Frank G. Mahady, $5,000.00 until after lunch on 22 May 1973; however, in November of 1974 Fucci told Agents Burke and Tighe that after he recieved the $10,000.00 fee on the morning in question he went directly to the law offices of Mahady in order to pay him $5,000.00; and

3. At the trial Fucci testified that he was unable to recall having made any arrangements with the Appellant prior to 22 May 1973 with respect to the payment of his legal fees; however, Agent Axton testified, that on the Friday immediately preceding the date of his Trial Court testimony, Fucci stated to the Assistant U.S. Attorney and Agent Axton

that he (Frank F. Fucci) requested from the Appellant, one or two days before 22 May 1973, that she have his fee available on the morning of 22 May 1973.

It must also be recalled that Attorney Fucci was uncertain as to whether the State's Attorney or the Deputy State's Attorney amended the criminal information on 22 May 1973, in open court, in Fucci's presence.

Fucci testified that his files and records contained no notes, memoranda or any written record as to who actually paid or handed him the $10,000.00 on 22 May 1973, until he corresponded with the Internal Revenue Service on 19 March 1974, at which time he stated in writing, for the first time, that the $10,000.00 was paid by Pauline A. Stebbins (Tr. pp 198-201 and Exhibit D.)

The Appellant feels that such facts can lead only to one conclusion -- that Fucci either contradicted himself concerning, or was confused about, numerous significant events which occurred on or immediately prior to 22 May 1973. It is not unreasonable to assume that absent the supporting testimony given by the various Government agents in this case, the jury would have made a determination that Fucci was also confused about the identity of the person who handed him the $10,000.00 on 22 May 1973. Because of the contradictions, discrepancies and confusion which characterized Frank F.

Fucci's testimony, the testimony of the Government agents took on an importance which such testimony would not otherwise have had.

B - Statements to Agents Axton and Hess.

F.B.I. Agents Axton and Hess interviewed the Appellant at the Polka Dot Restaurant on 7 January 1976. The final version of the interview form (F.B.I. Form 302) was prepared by Axton. Agent Hess did not take any field notes and the interview was conducted by Agent Axton (Tr. p 3). There were no other witnesses to the interview (Tr. p 4).

Agent Axton did not take any notes during the 15 minute interview on 7 January 1976 with the Appellant (Tr. p 117). He reduced his recollection of the "substance" of the interview to a typed rough draft of Form 302 (Tr. pp 117-119). His rough draft of Form 302 consisted of a typewritten draft prepared by himself, which he forwarded to Albany, New York to be retyped by a stenographer (Tr. p 118). When the final draft of Form 302 was returned to him from Albany, he compared it to his rough draft Form 302 and then destroyed his rough draft Form 302 (Tr. pp 118-119).

Agent Axton typed the rough draft 302 on 8 January 1976, the day after the interview took place. He stated that he had performed other duties (which could have consisted of

both office work and other interviews) on the day of the interview with the Appellant (Tr. pp 121-122). The rough draft Form 302 was reviewed by Agent Hess before it was mailed to Albany (Tr. p 122).

Agent Axton testified that he believed that it was standard operating procedure for F.B.I. agents to destroy rough drafts of interview notes and, also, that he assumed that there was an instruction in the Agent's Manual which required destruction of an agent's rough notes (Tr. p 123).

In testifying concerning whether the final draft of Form 302 contained any verbatim statements, Agent Axton prevaricated. At one point he indicated that he had no "knowledge" or "recollection" if the final draft of Form 302 contained any of the exact words used by the Appellant, but that it was his practice to put exact words in quotes (Tr. pp 124-125). However, when asked whether one of the sentences from the final draft of Form 302 contained the exact words used by the Appellant, Agent Axton stated that "It could be a change of an adjective, or a preposition or something like that. This is in substance, what she said." (Tr p 125)

The third and fourth sentences of the final draft of Form 302 state as follows:

1. Sentence No. 3

"She stated that the fee of $10,000.00 which was

paid to Fucci was provided by Joseph Leary and was in cash and that she had given the money to Fucci." (Tr. p 124 and 304)

2. Sentence No. 4

"She stated that she denied that she had paid the money and that this was the truth." (Tr. p 125 and 304)

C - Statements to Agents Burke and DeCoigne.

I.R.S. Agents Burke and DeCoigne conducted a ten to fifteen minute interview of the Appellant (Tr. pp 95 and 101) at the Polka Dot Restaurant on 18 September 1973. The final version of the Memorandum of Contact was prepared primarily by Agent Burke, who took written notes during the course of the interview (Tr. p 97); Agent DeCoigne did not take any written notes during the course of the interview (Tr. pp 10 and 97). The final version of the Memorandum of Contact, which pertains to the interview of the Appellant, consisted of less than two type written pages (Tr p 109). According to Agent Burke's testimony, after the completion of the interview of the Appellant, the agents interviewed William Paul Stebbins for approximately thirty to thirty-five minutes (Tr. p 95).

After these interviews were completed, Agent Burke testified (Tr. p 98) that he: 1) returned to his office; 2) reviewed his rough notes; 3) prepared an outline of his rough notes, with the assistance of Agent DeCoigne (Tr. pp

16 and 99); and 4) dictated, into a cassette tape recorder the final Memorandum which was based upon his outline of his rough notes.

Subsequently, dictation tape was given to a group secretary who transcribed it, and returned the transcription to Agent Burke. He then compared the transcription with his original notes and outline; made any "appropriate changes necessary"; and then destroyed his original notes.

According to Agent Burke, the outline could have been prepared on the day of the interview or as many as two days after the interview (Tr. p 103). The dictation of the final Memorandum, from the outline, was done anywhere from three to five days after the interview (Tr. p 104). Agent Burke conducted between thirty-five and forty interviews in connection with the I.R.S. investigation of William Paul Stebbins, including the interview in question (Tr. p 105).

Agent Burke testified that during the course of the interview in question he "may have taken verbatim statements", but that his usual practice was to put such statements in quotes. He further testified that he did not "recall taking specific verbatim statements." (Tr. p 108)

However, before Agent Burke was initially confronted with the use of the word "verbatim", he stated that he <u>"would record statements made by Mrs. Pauline Stebbins or William Paul Stebbins</u> that may relate to the income tax liability of

William Paul Stebbins at some future date" (Tr. p 97, emphasis added.). Also, Agent DeCoigne indicated that it was possible that Agent Burke took some verbatim remarks during the interview (Tr. p 21). It is interesting to not that on the bottom of page 16 of the Trial Transcript Agent DeCoigne indicated that with respect to the preparation of a summary "We summarized the points which we covered in the interview. The questions which were asked and the responses thereto and then we dictated them into a machine." (Tr. p 16, emphasis added.) The first typewritten page of the final Memorandum of Contract contained thirty-nine statements of fact alleged to have been made by the Appellant during the ten to fifteen minute interview (Tr. pp 109-112). Agent Burke conceded that "actually all of those statements were made by her, generally." (Tr. p 110). Thus, during the course of a ten or fifteen minute interview, Agent Burke took field or rough notes which enabled him to eventually prepare a final Memorandum of Contact which, on one single page, contained thirty-nine statements of fact allegedly made by the Appellant. (Tr. p 112)

Agent Burke persisted in his claim that the Memorandum of Contact merely "paraphrased" what was said by the Appellant Stebbins on 18 September 1973 (Tr. p 112). How-

ever, when counsel for Appellant focused on one allegedly paraphrased statement from the Memorandum of Contact, the following exchange took place on pages 112 and 113 of the Transcript:

> Q. Let me read to you an alleged statement of fact which you have numbered as 17. This is in reference to her son William. It says, "has many friends in White River Junction." Now, if that is a paraphrase of a statement made by Mrs. Stebbins, what would the original statement have sounded like, do you recall?
>
> A. She may have said he made, he had many associates or friends. I couldn't really venture that is exactly what she said. If I recorded exactly what she said, it would usually be in quotes. That is my standard procedure.

It is obvious that the Memorandum of Contact which resulted from the 18 September 1973 contained numerous verbatim or substantially verbatim statements allegedly made by the Appellant.

Agent Burke testified that it is his routine practice to destroy his rough notes (Tr. p 114) even though he did not "recall specifically if there are any citations in the manual telling us to save notes." (Tr. p 113)

In summary, Frank F. Fucci, was the only Government witness who testified that he saw the Appellant hand him the $10,000.00; the two F.B.I. Agents were the only Government witnesses who testified that the Appellant told them that she had given the money to Fucci. No other government

witness or evidence established the transactions in question or established that the Appellant made any statement to the effect that she had given the money to Fucci.

III - ISSUE

The destruction of rough or field notes of a defendant's statements, by government agents, usurps the judicial responsibility to rule on the discoverability of evidence under the Brady Rule, the Jencks Act and Rule 16 of the Federal Rules of Criminal Procedure. Destruction of such notes requires suppression of testimony by the agents as to the evidence contained in such rough or field notes.

IV - ARGUMENT

A - Determination of Discoverability of Evidence is the Duty for the Court.

The determination as to discoverability of evidence is one for the Court to make, not the prosecution or government agents. Campbell v. U.S., 365 US 85 at 92-93, 81 SCt 421, 5 LEd2d 428 (1961). The question of production of statements is not to be solved through one party's determination that they are not to be produced for defense counsel or the trial judge, for determination as to their relation to the matters in issue. Palermo v U.S., 360 US 343 at 361, 79 SCt 1217 at 1229, 3 LEd2d 1287 (1959) (Brennan, J., concurring).

If government agents may indiscriminately destroy rough or field notes, such as those generated and then destroyed by Agents Axton and Burke, the agents are, in effect, determining that such rough or field notes are not to be viewed by not only counsel for the defendant, but the trial court itself. The destruction of the rough or field notes prepared by Agents Axton and Burke usurped the judicial function of determinaing the discoverability of such notes pursuant to applicable constitutional and statutory standards. U.S. v Harrison, 524 F2d 421 (CA DC, 1975) and U.S v Harris, 543 F2d 1247 (CA 9, 1976). As such, the Trial Court should have prohibited the government agents involved from testifying as to matters for which rough or field notes had been prepared and destroyed, as the only appropriate sanction which would preserve to the trial court its prerogative to rule upon evidentiary questions of discoverability.

B - The "Brady Rule," the Jencks Act, and Rule 16 of the Federal Rules of Criminal Procedure Provide Independent Foundations for Preservation of Discoverable Materials.

In the federal system, access by a defendant to Government evidence is protected by both constitutional and statutory safeguards.

The so-called "Brady Rule," enumerated in Brady v. Maryland 373 US 83 at 87, 83 SCt 1194 at 1196, 10 LEd2d 215, (1963) holds that suppression of evidence favorable to

the accused, upon a request for production, violates due process of law, where the evidence is material either to guilt or to punishment; and irrespective of the good or bad faith of the prosectuion.

The destruction of rough or field notes by Agents Axton and Burke precluded any possible defense or judicial examination of the evidence for material discrepancies or other exculpatory information which might have brought the Brady Rule into play. The principle that rough or field notes from any witness interview could prove to be "Brady" material has been accepted by the Court of Appeal for the District of Columbia in U.S. v. Harrison, supra, 524 F2d at 427, and by the Court of Appeals for the Ninth Circuit in U.S. v. Harris, supra, 543 F2d at 1252.

Two additional and independent bases requiring the preservation of evidence are the Jencks Act, 18 USCA §3500, and Rule 16 of the Federal Rules of Criminal Procedure. The Jencks Act prohibits pretrial discovery of statements made by prospective government witnesses. If the witness testifies on direct examination at trial, however, the Act requires the government to produce previous statements of the witness insofar as they relate to the testimony at trial. U.S. v Percevault (2d Cir 1974) 490 F2d 126, U.S.v Sebastian (2d Cir 1974) 497 F2d 1267. The Jencks Act defines statements as

writings signed or adopted by the witness or accounts which are "a substantially verbatum recital of an oral statement made by such witness and recorded contemporaneously with the making of such oral statement". 18 USCA §3500(c).

U.S. v Johnson, 521 F2d 1318 (9th Cir, 1975) noted that it is well established that individual notes and reports of government agents who testify for the government are the proper subject of inquiry and may be subject to production under the Jencks Act. The Court noted that it is the function of the trial court to determine producibility, i.e., to decide whether the notes constitute a Jencks Act "statement" and that the agents' testimony

> ..."to the effect that all of the information contained in the notes was transferred to his case report did not relieve the trial court of the duty to conduct the requested inquiry.... The question of whether an otherwise producible statement is useful for impeachment must be left to the defendant. Certainly the answer should not rest with the very witness whose testimony the defendant seeks to impeach." [U.S. v Johnson, supra, 521 F2d at 1320]

Admittedly, there are several cases in this Circuit indicating that, in varying contexts, the Jencks Act imposes no duty on law enforcement officers to retain rough notes when the contents are incorporated into official records and the notes are destroyed in good faith. U.S. v Terrell 474 F2d 872 at 877 (2nd Cir 1973); U.S. v. Covello 410 F2d 536 at 545 (2nd Cir 1968); U.S. v. Jones 360 F2d 92 at 95 (2nd Cir. 1966). This practice, however, was criticized in U.S. v

Thomas 282 F2d 191 at 194 (2nd Cir 1960).

> [Jencks Act] 'statement' means a fairly comprehensive reproduction of the witness' words and does not include fragmentary notes, jottings, scraps or writings which are not 'substantially verbatim'. However, as a practical matter such a construction does not mean that notes of the type here made should be destroyed. Wherever the word 'substantially' is used, there will be a need for some judge to determine what is substantial. In this case he might well have held that these notes did not come within the statute. If so, production would not have been required. On the other hand, he might have found enough therein to warrant production. Borderline situations should be resolved by the trial judges and not by government agents. Hence it would be the better practice to preserve the written notes taken on interviews with persons accused or suspected of crime.

It should be noted that these cases focused on the Jencks Act and its restrictive definition of "statement", rather than the general duty of preservation of evidence. None of the cases analyzed addressed the Jencks Act requirements in conjunction with the Brady Rule or Rule 16 of the Federal Rules of Criminal Procedure, which are independent grounds for preservation of rough or field notes.

Appellant contends that the testimony of Agent Axton establishes that the draft he prepared contained Jencks Act statements and that his intentional destruction of the document requires that his testimony should have been excluded.

Agent Burke indicated he may also have taken substantially verbatim statements from the Appellant as he was

able to enumerate over thirty-five statements of fact allegedly made by her during a ten to fifteen minute interview. Agent Burke's testimony should likewise have been excluded because of his intentional destruction of his rough notes.

Rule 16 of the Federal Rules of Criminal Procedure now provides, inter alia, that upon request of a defendant the government shall permit the defendant to inspect and copy "the substance of any oral statement which the government intends to offer in evidence at the trial made by the defendant whether before or after arrest in response to interragation by any person then known to the defendant to be a government agent." In U.S. v Johnson, supra, this Court held that the written summary of an oral statement made by a defendant to a government agent is discoverable under Rule 16(a). Furthermore, where a government agent's memorandum sets forth the substance of statements attributed to the defendant, even if it is not verbatim, it is a recorded summary of statements attributed to the defendant, and subject to inspection under Rule 16(a). U.S. v Kuperberg, 288 F.Supp. 115 at 116 (S.D.N.Y. 1967). U.S. v Crisona 416 F2d 999 (2nd Cir 1969) concluded that tape recordings, even though a transcript was given to defendant, were statements for Rule 16(a) purposes and discoverable.

The 1975 amendment of Rule 16 continued the modern trend of granting greater discovery to both the government and the defense. Disclosure under Rule 16(a)(1)(A), "Statement of Defendant", was made mandatory to counteract the occasional judicial requirement that good cause was required to be shown. More liberal discovery, according to the 1975 Committee note,

> contributes to the fair and efficient administration of criminal justice by providing the defendant with enough information to make an informal decision as to plea; by minimizing the undesirable effect of surprise at the trial; and by otherwise contributing to an accurate determination of the issue of guilt or innocence. [8 Moore, Federal Practice, ¶ 16.01[4]]

The Committee noted that a majority of the American Bar Association's Committee on Standards Relating to Discovery and Procedure Before Trial rejected the restrictive Jencks Act definition of producible statement. The majority believed that the defendant should be able to see his statement in whatever form it may have been preserved. "... in fairness to the defendant and to discourage the practice, where it exists, of destroying original notes, after transforming them into secondary transcriptions, in order to avoid cross-examination based upon the original notes." (Emphasis added)

Appellant urges that the routine destruction of interview notes and original draft memoranda flies in the face of the legislative purpose of the 1975 revisions to Rule 16.

C - The Need to Preserve Rough or Field Notes Outweighs the Administrative Burden of Such Preservation.

In cases similar to this case, the government has advanced the argument that once a formal written report has been prepared by an agent (such as the F.B.I.'s Form 302 or the I.R.S.'s Memorandum of Contact), the retention of rough or field notes is superfluous and an administrative burden. Balanced against such concerns for administrative burden must be the obvious importance for impeachment purposes of any discrepancy -- however minor or apparently insignificant to the government agent -- between the formal written report and its rough predecessor. The comparison between rough or field notes and formal written reports has great importance if a significant portion of the formal written reports depend extensively on recollections not contained in the rough or field notes. Analysis of discrepancies, interpretations, or bias, which counsel for the Appellant has a right to examine and, if possible, exploit, can only be accomplished if all notes or records of government agents are preserved for judicial review as to discoverability.

The justification of destruction of rough or field notes to avoid administrative burden was forcefully rejected in U.S. v Bundy, 472 F2d 1266 (CA. D.C. 1972) and U.S. v Harrison, supra. As Circuit Judge J. Skelly Wright observed

in Harrison, 524 F2d at 429:

> ... administrative convenience has traditionally fared poorly as an asserted justification for government action infringing important rights of individuals, and the minimal burden here does not outweigh the significant values to be served by preservation.

To condone destruction of rough or field notes leaves the challenging defendant in an almost impossible predicament. In every case, the only evidence a defendant might be able to offer to show bias, inadvertent failure to accurately transcribe notes, or misinterpretation of the defendant's own statements comes from producing the rough or field notes -- made impossible by the agent's destruction of the notes. See, U.S. v. Harris, supra, 543 F2d at 1251-1252.

D - The Failure of the Trial Court to Exclude the Agents' Testimony Constituted Reversible Error to the Substantial Prejudice of the Appellant.

Reviewing the testimony of Frank F. Fucci, without whose testimony the government admitted it would be virtually impossible to convict the Appellant, it becomes apparent that the testimony of Agents Axton, Hess, Burke and DeCoigne was as crucial to the government's case as was the testimony of Fucci. Fucci's otherwise contradictory, confused and uncertain testimony was directly supported by the testimony of the Agents involved; and Agent Axton's testimony as to his

7 January 1976 interview with the Appellant is the only direct evidence from the Appellant indicating her Grand Jury testimony was not accurate.

In analyzing the two sentences set forth on pages 14 and 15 of this Brief, which were contained in Agent Axton's final written report, various hypotheses highlight the importance of examining the rough draft of Agent Axton's report.

If the single word "not" had been inadvertently omitted from the last portion of the third sentence in transcribing the rough draft of the report to its final form, it is reasonable to assume that the outcome of the trial would have been quite different. If that one word were in the report, it would confirm the Appellant's claim that she had not given money to Fucci. Also, if the last portion of the third sentence stated that "she had not given the money to Fucci," there would be a logical nexus between the third and fourth sentences of the final draft of Form 302, a logical relationship which is not at all clear in the reported versions of these two sentences. Agent Axton denied that the word "not" could have been missing from the last part of the third sentence (Tr. pp 126-127), but previously testified that the fourth sentence contained the "substance" of what the Appellant had said on 7 January 1976,

with the possible "change of an adjective, or a preposition or something like that." (Tr. p 125, emphasis added.)

In Agent Axton's thinking, the fourth sentence of the final draft 302 was the "substance" (Tr. p 125) of what the Appellant had said but not a verbatim statement because, again, "an adjective or a preposition or something like that", may have been changed.

The total absence of any direct quotations, set off by quotation marks, attributable to the Appellant, in the interviews reported by Agents Axton and Burke — combined, for example, with thirty-nine statements on a single page, from a ten to fifteen minute interview with DeCoigne (Tr. p 112) — can lead to no other conclusion but that the Agents consciously do not add the quotation marks, claiming all matters contained in their reports are merely the "substance" of what was said.

In addition, Agent Axton's testimony to the effect that it was both standard operating procedure and an agency requirement to destroy rough drafts of interview notes appears to be incorrect. In U.S. v. Harrison, 524 F2d 421 at 425 (CA. D.C., 1975) it was noted that the so-called Miller Memorandum of 12 April 1961 had established standards for F.B.I. Field Agents to retain certain types of written materials developed in interviewing witnesses, including the following:

> "Notes which are a substantially verbatim recital of an oral statement by the witness. This would cover shorthand, speedwriting or long hand notes, as long as they are substantially verbatim and complete in recording what the witness said on interview. Even here a transcription of the notes would suffice for the purposes of production, but prudence would seem to dictate retention of the notes in case of any dispute about the accuracy of transcription." [Emphasis added]

It is clear that Agent Axton's rough draft 302 contained what he defined to be the "substance" of the statements made by the Appellant. Appellant contends that, based upon the testimony of Agent Axton contained on page 125 of the Transcript, with respect to adjectives and prepositions, the statements contained in the rough draft 302 were substantially verbatim recitals of oral statements made by the Appellant on 7 January 1976; and, as such, should have at least been retained under the guidelines set forth in the Miller Memorandum, apparently the F.B.I.'s procedural standard.

In the absence of the rough draft of Agent Axton's report and Agent Burke's rough or field notes, we are adrift as to how to insure the Appellant her right to obtain all of her own statements, in whatever form, in possession of the government, as guaranteed by Rule 16 of the Federal Rules of Criminal Procedure; her right to have judicially determined whether the statements were substantially verbatim, thus discoverable under the Jencks Act; or of potential aid to Appellant in cross-exam-

ining government witnesses, thus discoverable under the Brady Rule. As pointed out in U.S. v. Harrison, supra, and U.S. v. Harris, supra, if the rough draft or rough or field notes cannot be produced, thus prejudicing the defendant, then the testimony of the agents involved must be kept from the trier of fact.

In Harrison the Court did not impose the sanctions Appellant seeks here, holding that the defendant Harrison had not been prejudiced because the contemporaneous rough or field notes of local police officials had been preserved, affording the defendant an opportunity to examine the notes and use them in preparing his case. 524 F2d at 435.

In Harris the Court also did not impose the sanctions Appellant seeks here, holding that the testimony of the agent whose notes had been destroyed was favorable to the defendant, resulting in no demonstrable prejudice to the defendant. 543 F2d at 1253.

In this case, though, it is clearly demonstrable that the testimony of the government agents was crucial to corroborate the less-than-sound testimony of Fucci and to establish vital admissions allegedly made by the Appellant. It is also reasonable to assume that such testimony had a significant effect on the outcome of the trial.

In the presence of the jury Agent Axton gave testimony relative to his interview of the Appellant on 7 January

1976 at the Polka Dot Restaurant at White River Junction, Vermont. Agent Axton questioned her about her testimony before the Federal Grand Jury on 4 September 1975 (Tr. p 289). He stated that during the course of the interview she told him that $10,000.00 came from Joseph Leary and that she had given the money to Frank Fucci (Tr. p 290). Agent Axton went on to testify that the Appellant then stated to him that she had told the Grand Jury that "she had not paid money, that she had not denied that she had given the money to him." (Tr. p 290) In other words, Agent Axton testified that when he interviewed her she made a distinction between the words "pay" and "deliver", explaining to him, in effect, that while she had delivered the money to Frank Fucci she had not paid him the money (Tr. p 306 and App. p 28 for a copy of page 304 of the Transcript which contains the incriminating statements allegedly made by Pauline A. Stebbins to Agent Axton).

If the Appellant in fact made such a statement to Agent Axton, that she had delivered the money to Frank F. Fucci, it would have been inconsistent with portions of her Grand Jury testimony, establishing the government's case. See the Indictment, App. p 1.

Agent Hess also testified before the jury relative to the 7 January 1976 interview conducted by Agent Axton. His

testimony confirmed the testimony of Agent Axton. (Tr. p 318). It may be recalled that Agent Hess did not take any notes during the course of the interview (Tr. p 320).

The importance of the testimony of Agents Axton and Hess to the government's case cannot be overstated.

In Harrison, Judge Wright made it clear that notes of the nature Appellant sought, but which had been destroyed, would have to be preserved:

> We cannot conceive that any valid law enforcement interest will be impaired by retention of the rough notes taken in interviewing witnesses. It may well prove that the Government is correct in its judgment that the notes are almost never discoverable, that they are too cryptic or fragmentary to be producible "statements" under the Jencks Act, and that they are always integrated into the 302 reports with such accuracy and completeness that there is nothing even arguably "favorable" about them to trigger disclosure under Brady v. Maryland. But such judgments cannot be made in gross. They must be decided in each individual case, and they must ultimately be decided by a court. Our holding does nothing more than preserve the evidence so that a court can meaningfully play its proper role. [524 F2d at 435]

Judge Orrick in Harris spoke just as forcefully at 543 F2d 1253, noting:

> We reiterate our holding, however, that the F.B.I. must hereafter preserve the original notes taken by agents during interviews with prospective government witnesses or with an accused. The preservation of such evidence is necessary in order to permit courts to play their proper role in determining what evidence must be produced pursuant to the Jencks Act or other applicable law.

In similar fashion, Appellant urges this Court to

adopt the rationale of Harrison and Harris the Second Circuit; and to apply the principles not just prospectively, but to this case, due to the clearly crucial and clearly prejudicial nature of the Agents' testimony.

V - CONCLUSION

For the reasons set forth above, the Appellant respectively requests that this Court reverse the Appellant's conviction and remand the case for a new trial at which the testimony of Agents Axton, Hess, Burke and DeCoigne as to interviews with the Appellant on 7 January 1976 and 18 September 1973 would be barred due to destruction of rough or field notes or draft reports by such Agents.

Respectfully submitted

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